1992

Susan Anne Wells v. David John Wells : Brief of Appellee

Utah Court of Appeals

Peter W. Guyon; Attorney for Appellee.
James B. Hanks, Esq; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

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SUSAN ANNE WELLS,	:	BRIEF OF APPELLEE
Plaintiff and Appellant,	:	
v.	:	
DAVID JOHN WELLS,	:	Case No. 920230-CA
Defendant and Appellee.	:	Priority No. 16

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Defendant and Appellee submits the following brief in opposition to the pending appeal of Plaintiff and Appellant to the Court of Appeals of the State of Utah from an order entered on March 3, 1992 by the Third District Court of Salt Lake County, the Honorable David S. Young presiding.

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II.

JURISDICTIONAL STATEMENT

Appellee recognizes this Court's power to hear the appeal on the issue of permanent alimony pursuant to 78-2a-3(2)(i), Utah Code, but challenges this Court's jurisdiction, as hereinafter argued, to hear the issue of temporary alimony.

III.

ISSUES PRESENTED FOR REVIEW

A. Whether this Court can consider Plaintiff's attempt to appeal the Court's denial to her of temporary alimony in its order of September 30, 1991, where

1) No appeal was taken from the order pursuant to Rules 3 and/or 4, Utah Rules of Appellate Procedure;

2) No permission was sought or granted to appeal the order under the provisions of Rule 5, Utah Rules of Appellate Procedure, relating to interlocutory order; and

3) No attempt was made on the part of Plaintiff to preserve the issue of the denial of temporary alimony.

Standard of Appellate Review:

Error in Law

Authority:

Rule 3, Utah Rules of Appellate Procedure

Rule 4, Utah Rules of Appellate Procedure

B. Whether the Court erred in denying Plaintiff's Petition to Modify to increase alimony.

Standard of Appellate Review:

Abuse of Discretion

Authority:

Bell v. Bell, 810 P.2d 489 (Ut. App. 1991)

Chambers v. Chambers, 198 Utah Adv. Rep. 49 (1992)

English v. English, Utah, 565 P.2d 409 (1977)

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Walker v. Walker, Utah, 707 P.2d 110 (1985)

Watson v. Watson, 194 Ut Adv. Rep.42 (Ut. App. 1992)

C. Whether the Court erred in refusing to award Plaintiff attorney fees.

Standard of Appellate Review:

Abuse of Discretion

Authority:

Bell v. Bell, 810 P.2d 489 (Ut. App. 1991)

Chambers v. Chambers, 198 Ut. Adv. Rep. 49 (Ut. App. 1992)

Rasband v. Rasband, 752 P.2d 1331 (Ut. App. 1988)

IV.

STATUTES AND RULES

1. Section 30-3-5(3), Utah Code:

> (3) The court has continuing jurisdiction to make subsequent changes or new orders for the support and maintenance of the parties, the custody of the children and their support, maintenance, health, and dental care, or the distribution of the property and obligations for debts as is reasonable and necessary.

2. Rules 3, 4 and 5, Utah Rules of Appellate Procedure

See addendum

V.

STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings Below and Disposition.

Plaintiff appeals the order of the order of the Honorable David S. Young of March 3, 1992, denying Plaintiff's PETITION FOR MODIFICATION OF DECREE OF DIVORCE dated August 22, 1991. Plaintiff also purports to appeal this Court's ORDER ON MOTION FOR TEMPORARY ALIMONY dated September 30, 1991, which resulted in the Court's denial to Plaintiff of her motion for temporary alimony.

The instant petition was originally filed on August 22, 1991, and later amended by Plaintiff's AMENDED PEITION FOR MODIFICATION OF DIVORCE DECREE, filed on January 13, 1992, wherein Plaintiff asked for the following relief insofar as alimony is concerned:

> A. For an order granting alimony to plaintiff in a reasonable amount per month until plaintiff is able to meet her current monthly expenses without such an award; . . . (R. 306, ¶A)

The matter was heard at trial on February 11, 1992. Plaintiff testified on her own behalf and offered the testimony of

two "friendly" witnesses. Thereafter Plaintiff called Defendant as an adverse witness and rested. (R., 488) At the conclusion of Plaintiff's case in chief Defendant moved to dismiss, which motion was granted by the Court. (R., 492) At no time thereafter did Plaintiff move to amend pleadings, re-open the case to offer additional testimony or seek any relief from the Court of any nature whatsoever. The instant appeal followed the entry of this Court's ORDER DISMISSING PETITION TO MODIFY on March 3, 1992.

2. Statement of Facts.

1. These parties were divorced by DECREE OF DIVORCE entered in this Court on November 29, 1982. Plaintiff was awarded under that decree alimony in the amount of $1.00 per year. (R, 133)

2. The Court made no findings regarding the reason for granting alimony in the original decree. Indeed, the decree, save the issue of custody of Mark Wells, was entered into pursuant to stipulation. (R, 129)

3. The Decree of Divorce also had provided that Defendant was granted a lien on the parties' marital residence of $15,000.00, payable when the house was sold, within 6 months of the

youngest child's reaching 18 or within 6 month's of Plaintiff's remarriage or cohabitation. (R, 134-135)

4. This $15,000.00 lien in Defendant's favor was never paid and was bankrupted by Plaintiff. (R, 350, ¶4-6; and R, 357-8, ¶2-3)

5. Plaintiff's first attempt to increase the alimony award came on June 17, 1989, when she filed a VERIFIED PETITION FOR MODIFICATION OF DECREE OF DIVORCE, in which she requested, inter alia, that [t}he court should increase the alimony ordered to be paid by Defendant to Plaintiff to a minimum of $1,500.00 per month." (R., 246, ¶ (b))

6. Defendant answered, denying the material allegations, and counterclaimed for a change in custody and other relief. (R., 250-255)

7. Defendant sought in his AMENDED COUNTER-PETITION TO MODIFY DECREE OF DIVORCE dated April 18, 1990 to secure payment of the $15,000.00 lien (R, 272-277). Although the Court did not allow the actual filing of the amended counter-petition, it did recognize that the factual bases presented therein could be considered. (R, 291)

8. Plaintiff's June 17, 1989 Petition and Defendant's Counter-petition were resolved by stipulation on August, 9, 1990, and the Court thereafter entered its ORDER MODIFYING DECREE OF DIVORCE AND ON PENDING MATTERS dated November 1, 1990. Pursuant to that stipulation Plaintiff's petition to increase alimony was dismissed, (R., 303, ¶ 5) as were Defendant's claims to secure payment of the $15,000 lien. (R., 302)

9. The instant petition was originally filed on August, 22, 1991, but was amended in the form of Plaintiff's AMENDED PETITION FOR MODIFICATION OF DIVORCE DECREE dated January 13, 1992. The latter sought, consistently with the former, the following relief insofar as the question of alimony is concerned:

> A. For an order granting alimony to plaintiff in a reasonable amount per month <u>until plaintiff is able to meet her current monthly expenses without such an award</u>; . . . (R., 306, ¶ A) [emphasis added]

10. At the time of the trial on February 11, 1992, Defendant sought the Court's ruling that the issue of alimony was res judicata prior to November 1, 1990, the date of the order denying the June 17, 1989 petition to raise alimony (R., 441-443)

but the Court denied the motion without prejudice (R., 444) and never specifically ruled on the issue.

11. In any event, the evidence before the Court on February 11, 1992 relevant to the requirements of Schindler v. Schindler, 776 P.2d 84 (Utah App., 1989), discussed in detail below at pages 17-19, is outlined as follows:

a) Plaintiff, at the time of the trial, was employed and making $3,000.00 per month. (R, 439)

b) Plaintiff's gross income at the time of the Decree of Divorce in early 1983 was approximately $11,000.00 per year. (R, 441)

c) At the trial on February 11, 1992, Plaintiff also testified that Defendant was making $42,000 to $43,000.00 per year at the time the Decree of Divorce was entered, (R., 445) which testimony was uncontroverted in that Defendant did not remember his salary at that time. (R., 487)

d) Defendant's income at the time of the trial on February 11, 1992 was $5,600 per month, or $67,200 yearly. (R., 486)

e) Plaintiff was employed at Becton-Dickenson from 1980 to 1984. (R, 445-446)

f) After approximately two months unemployment, Plaintiff found a job with Wicat Systems in Orem, Utah. (R, 446-447)

g) In February of 1985, Plaintiff took employment with her Hercules Aerospace in Magna, Utah, which employment lasted until December, 1986 (R, 447)

h) In February, 1987, Plaintiff secured employment with Morton-Thiokol, which lasted until June of 1990. (R, 448)

i) Plaintiff voluntarily terminated her employment at Morton-Thiokol. (R, 453)

j) Plaintiff then took employment with Futura Industries at $40,000.00 per year on June 29, 1990, the day after she left Morton-Thiokol. (R, 454)

k) Plaintiff lost her job at Futura Industries on September 10 [1990], over allegations of sexual harassment and Plaintiff's suit against them with the UEOC. (R, 454)

l) Beginning in January, 1991, Plaintiff secured employment at Edo Corporation at $36,000.00 per year. This employment lasted until May 24, 1991. (R, 454-455)

m) Plaintiff received unemployment compensation from the time of her termination at Edo Corporation until January 20, 1992, when Plaintiff became employed at her present employment. (R, 455-456)

n) During the period of Plaintiff's unemployment before her present employment, she received over $6,000.00 in unemployment benefits, along with approximately $4,500.00 in child support payments from Defendant. (R, 471-472)

o) Plaintiff had fallen behind in her obligations as a result of her unemployment, prior to finding her present job. (R., 457-460)

12. At the conclusion of the evidence the Court then made the following findings:

> All right. I have reviewed the facts that you present, Mr. Hanks, and the - I think the court would be obligated to find that there has been a change in circumstance just simply by the fact of unemployment and in re-employment and those kinds of events occurring in Ms. Wells' life, but at the same time I do believe that there is no establishment of

> sufficient evidence to justify a change in requiring alimony be paid.
>
> In fact, it strikes me that under the circumstances of this case both of these parties are uniquely able to earn substantial amounts of money to meet their needs and obligations. Her employment has been $40,000.00, is now $30,000.00. There are decisions associated with that employment that she must make as to whether she is going to reside in Utah, in Layton, or whether she is going to move to Idaho Falls where the job is, her family, her circumstances, her children, justify the move to Idaho Falls. The determination to leave the job because she was dissatisfied with the travel challenges, those are all decisions that everybody has to make in the normal course of their life.
>
> I don't see that the circumstances of this case could establish a sufficient basis for the court to conclude that I ought to do anything with the alimony. As a matter of fact, I have some basic concerns about the protection of the one-year, or the one dollar per year provision under the circumstances of this case because both parties are able-bodied persons and able to earn income. . . .
>
> So based upon the testimony that I have heard, the presentations that have been presented here, the court finds that the petition to modify should be and the same is hereby denied. (R, 60-62)

13. The court, upon further questioning on the part of Plaintiff's attorney, made an additional finding as follows:

> . . . the circumstances of the fact that she has been unable to develop seniority, those circumstances are no different than an awful lot of other people. She now has the opportunity to be employed at $30,000.00 a year, and that's more substantial than probably 60 percent of our population, if not more, and that, to me, is adequate income to meet her needs.

14. Contrary to Plaintiff's representations, Judge Young never specifically ruled that there was a "substantial" change in circumstances shown by Plaintiff, although he did acknowledge a "change." (R., 490) In view of the result, however, that is a moot point.

VI.

SUMMARY OF ARGUMENTS

1. Plaintiff cannot appeal the denial of her request for temporary alimony pendente lite of September 30, 1991, in that Plaintiff has failed to follow the appellate procedure of Rules 3, 4 and 5 by failing to appeal the order as a final order; by failing to seek the Appellate Court's approval by appealing the order as an interlocutory order; and by failing to preserve the issue of temporary alimony for later appeal.

2. With regard to Plaintiff's petition to increase alimony, the Court is vested with broad discretion, and the findings and conclusions of the trial court are presumed to be correct, unless appellant can show a clear abuse of discretion. The trial Court has considered the three Schindler factors as required by law and concluded that Plaintiff was not entitled to an increase in alimony. Given the consideration of those factors, the Court's conclusion that Plaintiff was not entitled to an increase in alimony is well within the Court's discretion, and does not constitute an abuse thereof.

VII.

ARGUMENT

1. PLAINTIFF'S ATTEMPT TO APPEAL THE DENIAL OF TEMPORARY ALIMONY IS IMPROPER.

Plaintiff identifies as an issue on appeal the Court's denial of PLAINTIFF'S VERIFIED MOTION FOR TEMPORARY CHILD SUPPORT AND ALIMONY, filed August 22, 1991. (R, 315-318) It is undisputed that the Court denied the motion for temporary alimony in its ORDER ON MOTION FOR TEMPORARY ALIMONY, signed and entered on September 30, 1991. (R, 361-362) As the following discussion will show,

Plaintiff failed to take the appropriate actions to preserve or appeal that order, and cannot now present that issue to this Court.

Rule 3, Utah Rules of Appellate Procedure (URAP), provides the circumstances under which an appeal may be taken from a trial court as follows:

> An appeal may be taken from a district . . . court to the appellate court with jurisdiction over the appeal <u>from all final orders and judgments</u> . . . by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. [emphasis added]

Rule 4, URAP, provides in pertinent part that

> [i]n a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the entry of the judgment or order appealed from.

Rule 4(e) URAP provides that the trial court may extend the time within which an appeal may be filed, but no motion for extension has been filed in this case, and the provisions of 4(e) are therefore inapplicable.

There may be an issue of whether or not the order denying the motion for temporary alimony is a "final order." A judgment which is "final" for purposes of an appeal has been held to be an

order "that ends the controversy between the parties litigant." Salt Lake City Corp. v. Layton, Utah, 600 P.2d 538 (1979) See also Kessimakias v. Kessimakias, Utah, 546 P.2d 888 (1976). Clearly the September 30, 1991 order ended the controversy of alimony pendente lite, and is arguably final in that sense. However, even if the September 30, 1991 order is interlocutory in nature, it cannot now be presented on appeal, as is discussed below.

The rules relating to interlocutory orders differ from those relating to final judgment, and are reflected in Rule 5, URAP as follows:

> 5(a) An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof service on all other parties to the action.

Rule 5 then goes on to specify the requirements of the content of the petition and other requirements. It is again undisputed that Plaintiff did not petition this Court for permission to appeal the order denying temporary alimony. Neither did Plaintiff seek to preserve as error the denial of the motion

for temporary alimony, as would otherwise be necessary to now appeal that order. Haslam v. Paulsen, Utah, 389 P.2d 736 (1964).

Accordingly, the Court does not have to determine whether or not the order denying alimony was final or temporary, since Plaintiff has not complied with either Rule 3 or 5, Utah Rules of Appellate Procedure. Neither has Plaintiff sought to preserve as error the denial of temporary alimony, and this Court, for that reason, lacks jurisdiction over the question of temporary alimony.

2. THE COURT'S DENIAL OF PLAINTIFF'S PETITION TO MODIFY WAS PROPER.

A. Plaintiff's Petition to Modify Requests only Temporary Alimony.

Plaintiff's AMENDED PETITION FOR MODIFICATION OF DECREE OF DIVORCE dated January 13, 1992, alleges, inter alia, that

> Plaintiff ". . . has recently been laid off from her job as a result of a work force reduction [and that as a result] she has indefinitely lost the means to adequately support herself and provide adequate support and care for the minor child in her custody, Craig Wells." (R, 402)

The prayer of the Amended Petition specifically asks to modify the Decree of Divorce, but insofar as alimony is concerned, only

> . . . until Plaintiff is able to meet her current monthly expenses without such an award [.]

It is undisputed that Plaintiff made no motions pursuant to Rule 15, Utah Rules of Civil Procedure, to amend his pleadings at the time of trial, or thereafter, for that matter. Other than amendment as a matter of right, which decidedly does not apply here, Rule 15(a), Utah Rules of Civil Procedure, provides:

> [o]therwise a party may amend his pleading only by leave of court or by written consent of the adverse party; . . .

It is recognized that Rule 15(a) gives the court discretion to amend the pleadings to conform to the evidence presented at trial, but no motions were made and no orders uttered to allow such amendment. Clearly, then, Plaintiff was only seeking alimony on a temporary basis.

B. <u>The Court's Action in Denying Plaintiff's Petition to Modify was not an Abuse of Discretion.</u>

Plaintiff's brief on appeal is devoid of any criticism of the Court's findings or their adequacy. Plaintiff's position is, rather, that the Court's conclusion was an abuse of its discretion. Defendant wishes to make the point that the Court's conclusion and findings come clothed with the presumption of validity, which presumption of validity must guide this Court in its review of the trial court's actions.

The trial Court's discretion is very broad, and that discretion clearly extends to issues relating to modifications, as this case is. Whitehouse v. Whitehouse, 790 P.2d 57, 61 (Ut.App., 1990) Indeed, the Utah Supreme Court has stated in Harding v. Harding, Utah, 488 P.2d 308, 310 (1971) as follows:

> [The trial court's] actions are indulged with a presumption of validity and correctness and the burden is upon the appellant to show a basis for upsetting them: either (1) that findings have been made when the evidence clearly preponderates the other way; [citation omitted] or (2) that there has been a misunderstanding or misapplication of the law resulting in substantial and prejudicial error; [citation omitted] or (3) that it appears plainly that there has been such an abuse of discretion that an inequity or injustice has resulted. [citation omitted]

The Utah Supreme Court case of Paffel v. Paffel, Utah, 732 P.2d 96 (1986) provides further insight into the standards required of the trial judge. Appellant in that case had argued that since the trial court had failed to make findings

> ". . . concerning respondent's income, expenses, or need for support . . . ,"

that such was reversible error. At 102, the Court cited with approval the previous case of Walker v. Walker, Utah, 707 P.2d 110 (1985) and found that

> [a]s in Walker, the evidence in this case supports the lower court's order, and appellant has made no showing to rebut the presumption that the trial court did consider respondent's income, expenses, and need for support.

The Paffel decision has been cited more recently in the case of Chambers v. Chambers, Utah App., 198 Utah Adv. Rep. 49 (1992), where the court at 49, relying partly upon the Paffel case, stated as follows:

> The trial court is given considerable discretion to provide for spousal support, and such an award will not be overturned on appeal unless there has been a clear and prejudicial abuse of discretion. [citations omitted]

The Chambers court also provided the following insight into alimony questions. At 49 the Court stated as follows:

> In Schindler v. Schindler, 776 P.2d 84 (Utah App. 1989), we outlined the factors to be considered by a trial court in determining alimony: "(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income for him or herself; and (3) the ability of the responding spouse to provide support." [citations omitted in original] "If these three factors have been considered, we will not disturb a trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion." [citations omitted in original]

In the case of Watson v. Watson, Utah App., 194 Ut. Adv. Rep. 42 (1992), the trial court had made the finding that Mrs. Watson, by agreement of the parties, had not worked outside the home and calculated Mr. Watson's income from five years of income tax returns. The court then made the following finding:

> Based upon [Mr. Watson's] ability to earn, and the needs of [Mrs. Watson], . . .

The appeals court, at 43, found as follows:

> The trial court's written findings demonstrate that the court considered the factors set out in Schindler, and those findings are supported by the evidence. Therefore, we conclude that

the trial court did not abuse its discretion in determining the alimony award.

A review of this record adequately supports the conclusion that the court did not abuse its discretion in denying Plaintiff's petition for modification. The evidence on the record presented to the Court on February 11, 1992 is really not controverted. It is only the application of fact to law that is controverted. Furthermore, it is clear that the Court considered all the Schindler factors. The Court listened to Plaintiff's testimony regarding her financial condition and needs (R, 457-465) and specifically in its findings referred to those circumstances along with Plaintiff's lifestyle decisions. (R, 490, 491) Furthermore, he specifically considered the abilities of both of these parties to earn (R, 490-491), and after considering those factors concluded that there was no basis to change alimony as requested by Plaintiff. There is no doubt that the Court also considered the historical capabilities of the parties to earn income, which is a legitimate consideration. English v. English, Utah, 565 P.2d 409 (1977)

Just because Plaintiff does not agree with the result does not mean that the Court has abused its discretion. It is

clear that the Court has considered the three elements of Schindler, and as the Chambers case at 49 stated, as long as

> . . . these three factors have been considered, we will not disturb the trial court's alimony award unless such a serious inequity has resulted as to manifest a clear abuse of discretion. [citations omitted]

Such an abuse of discretion has not and cannot be shown here, and the trial Court's judgment must be affirmed by this Court in all particulars.

VIII.

THE COURT'S DENIAL OF ATTORNEY FEES TO PLAINTIFF WAS NOT AN ABUSE OF DISCRETION

The determination of whether or not to grant attorney fees rests in the sound discretion of the trial court, and cannot be overturned on appeal except in the case of an abuse of discretion. Chambers v. Chambers, 198 Ut. Adv. Rep. 49, 50 (1992); Bell v. Bell, 810 P.2d 489, 493 (Ut. App., 1991).

An award of attorney fees, according to Chambers

> . . . must be based on evidence of the reasonableness of the requested fees, as well as the financial need of the receiving spouse, and the ability of the other spouse to pay. [citing] Rasband v. Rasband, 752 P.2d 1331, 1337 (Ut. App., 1988)

The Court, in the consideration of the issues required by Schindler addressed above, also considered the relative abilities of the parties, having found as follows:

> In fact, it strikes me that under the circumstances of this case both of these parties are uniquely able to earn substantial amounts of money to meet their needs and obligations. (R, 490-491)

Accordingly, the Court in addition made the following finding:

> I further find that each party should be ordered to pay their own individual attorney's fees and costs as they've incurred them. (R, 492)

Again, the Court's action is clothed with a presumption of validity, and cannot be overturned on appeal except upon a showing of an abusive discretion. Such showing has not and cannot be made, and the trial court's ruling on the issue of attorney fees must be upheld.

IX.

CONCLUSION

The foregoing argument clearly shows that Plaintiff has no right to appeal the Court's earlier denial of temporary alimony. The September 30, 1991 order has not been appealed, either as a

final judgment or as an interlocutory order, and Plaintiff has not preserved the issue to appeal presently. Accordingly, it is inevitable that this Court lacks jurisdiction to second-guess the trial court's denial of temporary alimony.

As far as the issue of a change in permanent alimony is concerned, Appellee does not believe that Appellant has carried her burden in any respect. Appellee disagrees that the Court found a substantial change in circumstances, although it did recognize a "change." Even if the Court's conclusion is construed to constitute a "substantial change" of circumstances, the Court's ultimate conclusion was that an increase of alimony to Plaintiff was not warranted. Given that conclusion, Plaintiff's only argument is that the Court abused its discretion.

A review of the case authorities set forth above recognizes that the trial court's discretion in matters of alimony, and including modifications of alimony, is very broad. The Appellate Court will not overturn the trial court's ruling unless Appellant can show an abuse of that discretion, and Defendant argues herein that Plaintiff has been unable to show such an abuse of discretion. Defendant has demonstrated in the foregoing

argument that the Court has considered the three factors set forth in the Schindler case, and that the Court's conclusion not to allow an increase in alimony was not an abuse of discretion.

Plaintiff has not really attacked the findings of the Court in this appeal, and for that reason Defendant has not sought to discuss the requirement that Plaintiff would otherwise have of marshalling the evidence. However, Defendant has demonstrated that the findings and conclusions of the trial court are clothed with a presumption of validity unless and until Appellant can overcome that presumption by a clear showing that the Court abused its discretion. Plaintiff has failed in that endeavor in the opinion of Defendant, and the appeal must be denied.

RESPECTFULLY SUBMITTED this 14th day of January, 1993.

PETER W. GUYON
Attorney for Defendant and
Appellee David J. Wells

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, first-class postage prepaid, to the following on this 14th day of January, 1993:

James B. Hanks, Esq.
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376 East 400 South
Salt Lake City, Utah 84111

ADDENDUM

Rules 3, 4 and 5, Utah Rules of Appellate Procedure.

UTAH RULES OF APPELLATE *PROCEDURE*

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41. Certification of questions of law by United States courts.
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51. Disposition of petition for writ of certiorari.

FORMS

TITLE I. APPLICABILITY OF RULES.

Rule 1. Scope of rules.

(a) **Applicability of rules.** These rules govern the procedure before the Supreme Court and the Court of Appeals of Utah in all cases. Applicability of these rules to the review of decisions or orders of administrative agencies is governed by Rule 18. When these rules provide for a motion or application to be made *in a district, juvenile, or circuit court or an administrative agency, commission, or board, the procedure* for making such motion or application shall be governed by the Utah Rules of Civil Procedure, Utah Rules of Criminal Procedure, and the rules of practice of the trial court, administrative agency, commission, or board.

(b) **Reference to "court."** Except as provided in Rule 43, when these rules refer to a decision or action by the court, the reference shall include a panel of the court. The term "trial court" means the court or tribunal from which the appeal is taken. The term "appellate court" means the court to which the appeal is taken.

(c) **Procedure established by statute.** If a procedure is provided by state statute as to the appeal or review of an order of an administrative agency, commission, board, or officer of the state which is inconsistent with one or more of these rules, the statute shall govern. In other respects, these rules shall apply to such appeals or reviews.

(d) **Rules not to affect jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the Supreme Court or Court of Appeals as established by law.

(e) **Title.** These rules shall be known as the Utah Rules of Appellate Procedure and abbreviated Utah R. App. P.

Rule 2. Suspension of rules.

In the interest of expediting a decision, the appellate court, on its own motion or for extraordinary cause shown, may, except as to the provisions of Rules 4(a), 4(b), 4(e), 5(a), and 48, suspend the requirements or provisions of any of these rules in a particular case and may order proceedings in that case in accordance with its direction.

TITLE II. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

Rule 3. Appeal as of right: how taken.

(a) Filing appeal from final orders and judgments. An appeal may be taken from a district, juve-

nile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted, (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 5. Discretionary appeals from interlocutory orders.

(a) **Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 20 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

(b) **Fees and copies of petition.** The petitioner shall file with the Clerk of the Supreme Court an original and seven copies of the petition, or, with the Clerk of the Court of Appeals, an original and four copies, together with the fee for filing a notice of ap-

peal in the trial court and the docketing fee in the appellate court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition and filing fee, to the trial court where the petition and order shall be filed in lieu of a notice of appeal. If the petition is denied, the filing fee shall be refunded.

(c) **Content of petition.** The petition shall contain:

(1) A statement of the facts necessary to an understanding of the controlling question of law determined by the order sought to be reviewed;

(2) A statement of the question of law and a demonstration that the question was properly raised before the trial court and ruled upon;

(3) A statement of the reasons why an immediate interlocutory appeal should be permitted; and

(4) A statement of the reason why the appeal may materially advance the termination of the litigation.

(5) The petition shall include a copy of the order of the trial court from which an appeal is sought and any related findings of fact, conclusions of law and opinion.

(d) **Answer.** Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. An original and seven copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) **Grant of permission.** An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. If the petition is granted, the appeal shall be deemed to have been docketed by the granting of the petition, and all proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments.

Rule 6. Bond for costs on appeal.

Except in a criminal case, at the time of filing the notice of appeal, the appellant shall file with the notice a bond for costs on appeal, unless the bond is waived in writing by the adverse party, or unless an affidavit as provided for in Section 21-7-3, Utah Code Ann. 1953 as amended, is filed. The bond shall be in the sum of at least $300.00 or such greater amount as the trial court may order on motion of the appellee to ensure payment of costs on appeal. No separate bond for costs on appeal is required when a supersedeas bond is filed. The bond on appeal shall be with sufficient sureties and shall be conditioned to secure payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. The adverse party may except to the sufficiency of the sureties in accordance with the provisions of Rule 62(i), Utah Rules of Civil Procedure.

Rule 7. Security: Proceedings against sureties.

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety must consent therein to the exercise of personal jurisdiction by the trial court and must irrevocably appoint the clerk of that court as an agent upon whom any papers affecting liability on the bond or undertaking may be served. The sureties' liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribes may be served on the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

Rule 8. Stay or injunction pending appeal.

(a) **Stay must ordinarily be sought in the first instance in trial court; motion for stay in appellate court.** Application for a stay of the judgment or order of a trial court pending appeal, or disposition of a petition under Rule 5, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

(b) **Stay may be conditioned upon giving of bond.** Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court.

(c) **Stays in criminal cases.** Stays in criminal cases pending appeal are governed by Rule 27, U.R.Crim.P.

Rule 9. Docketing statement.

(a) **Time for filing.** Within 21 days after a notice of appeal, cross-appeal, or a petition for review is filed, the appellant, cross-appellant, or petitioner shall file a docketing statement with the clerk of the appellate court. An original and seven copies of the docketing statement shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals.

(b) **Purpose of docketing statement.** The docketing statement is not a brief and should not contain arguments or procedural motions. It is used by the appellate court in assigning cases to the Supreme Court or to the Court of Appeals when both have jurisdiction, in making certifications to the Supreme Court, in classifying cases for determining the priority to be accorded them, in making summary dispositions when appropriate, and in making calendar assignments. Rules 10 and 11